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Son of Blagojevich: A Look at the Constitutionality of Illinois' New "Son Of Sam" Law

Matthew N. Stewart*

I. INTRODUCTION

"I've got this thing and it's . . . golden. And I'm just not giving it up for . . . nothing. I'm not going to do it. And I can always use it."¹ As Rod Blagojevich spoke these words, in reference to President-elect Barack Obama's vacant Senate seat, he had little idea that federal agents would soon use these recorded conversations to bring a fitting end to his corrupt reign as Illinois governor.² Blagojevich was under investigation for an alleged³ string of crimes that began before he was elected governor in 2002 and culminated in a nineteen-count indictment against

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1. Monica Davey, *Governor Accused in Scheme to Sell Obama's Senate Seat*, N.Y. TIMES, Dec. 9, 2008, available at <http://www.nytimes.com/2008/12/10/us/politics/10Illinois.html?ref=us>.

2. See *id.* Federal agents recorded phone calls placed by Blagojevich from both his campaign office and home for over a month. *Id.* The calls contained discussions of several ways in which Blagojevich could profit from potential Senate candidates, including securing a position for Blagojevich with the new administration as the Secretary of Health and Human Services, a union leadership post, and a high-paying leadership position with a nonprofit organization that would be created especially for the purpose of providing Blagojevich with a high-paying leadership position. *Id.*

3. At the time this Comment was submitted for publication, Blagojevich had been convicted of one count of making a false statement to federal investigators. Nancy Leung, *Blagojevich Trial Ends with One Conviction*, CNN, Aug. 18, 2010, <http://insession.blogs.cnn.com/2010/08/18/blagojevich-trial-ends-with-one-conviction/> (last visited Aug. 18, 2010). The jury, which reached the verdict on August 17, 2010, after 14 days of deliberation, was deadlocked on all the remaining charges against Blagojevich. *Id.* U.S. Attorney Patrick Fitzgerald said that he intends to retry Blagojevich for the counts on which the jury did not reach a verdict. *Id.*

him in December 2008.⁴ The charges included 16 felonies, ranging from racketeering conspiracy to attempted extortion.⁵

On January 29, 2009, less than two months after his arrest, the Illinois legislature showed its immediate disapproval of Blagojevich's actions by impeaching him and removing him from office by a senate vote of 59-0.⁶ Other state and federal officials were just as condemning in their appraisals of Blagojevich.⁷ One United States Attorney declared that "[t]he conduct would make Lincoln roll over in his grave."⁸ Illinois General Assembly Senator Dale Righter described Blagojevich as a "devious, cynical, crass and corrupt politician."⁹ No matter what words were used to describe the situation, the theme was the same: Blagojevich's actions were abhorrent and caused seemingly irreparable damage to how the public perceived the Illinois government. Replacement Governor Patrick Quinn summed up the situation well when he acknowledged that "[i]n this moment, our hearts are hurt. And it's very important to know that we have a duty, a mission to restore the faith of the people of Illinois in the integrity of their government."¹⁰

Nevertheless, since his removal from office in January 2009, Blagojevich, instead of trying to repair the damage, has used his notoriety from the incident to make money in any way possible.¹¹ He made paid appearances on political radio talk shows, signed a "six-figure" book deal, and even made a paid appearance at a corporate party as an Elvis impersonator.¹² An attempt at getting himself cast in a reality

4. Monica Davey & Susan Saulny, *Blagojevich Charged With 16 Corruption Felonies*, N.Y. TIMES, Apr. 2, 2009, available at <http://www.nytimes.com/2009/04/03/us/03illinois.html>.

5. *Id.* (explaining that the 19-count indictment was 75 pages long, and some of the charges included racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion, and making false statements to federal agents).

6. See *Times Topics: Rod R. Blagojevich*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/b/rod_r_blagojevich/index.html?offset=0&s=newest (last visited Oct. 30, 2009).

7. See, e.g., Davey, *supra* note 1.

8. *Id.*

9. Ray Long & Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich has been Removed from Office*, CHI. TRIB., Jan. 30, 2009, available at <http://www.chicagotribune.com/news/local/chi-blagojevich-impeachment-removal,0,5791846.story>.

10. *Id.*

11. See, e.g., Stacy St. Clair, *Rod Blagojevich Book Tour: Ex-governor Croons to Suspicious Minds*, CHI. TRIB., Sept. 9, 2009, available at <http://archives.chicagotribune.com/2009/sep/09/local/chi-bлаго-book-tour-09-sep09>; see also Monica Davey, *Ex-Illinois Governor Adds Author to His Resume*, N.Y. TIMES, Sept. 7, 2009, available at <http://www.nytimes.com/2009/09/07/us/07blago.html>.

12. See Davey, *supra* note 11; Andrew Wang, *Blagojevich Shakes, Rattles, and Rolls as Party Pro*, CHI. BREAKING NEWS CTR., Aug. 7, 2009, <http://www.chicagobreakingnews.com/2009/08/blagojevich-shakes-rattles-rolls-as-party-pro.html>. Blagojevich's paid appearance was at a block party for a video production company. *Id.*

show filmed in Costa Rica was nixed by a judge but resulted in his wife landing a part in the show.¹³ Blagojevich was, however, permitted to make a short-lived appearance on Donald Trump's reality television series *The Celebrity Apprentice*, which appearance he shamelessly used to try to bolster his image.¹⁴ In short, Blagojevich entered 2009 as a corrupt politician who used his office to make dirty money, and sank even lower by using this infamy to extract even more cash from the public.

Blagojevich's conduct since his impeachment has taken its toll on the patience of the citizens of Illinois. One Illinois resident expressed his view about Blagojevich and his attempt to profit from the scandal by saying, "It's an embarrassment. If you travel anywhere in the country or anywhere in the world, you have to hear about this guy."¹⁵ The alleged corruption of the ex-Illinois governor has shaken the confidence of the public regarding others in the Illinois political scene as well. In a poll taken a week after Blagojevich's arrest, 45% of U.S. voters surveyed thought it was likely that either "President-elect Obama or one of his top campaign aides was involved in the unfolding Blagojevich scandal in Illinois."¹⁶

In February 2009, Illinois House Representative Jack Franks sought to restore public confidence in the state government through a bill he introduced, which was signed into law on August 18, 2009.¹⁷ This law, known as the Elected Officials Misconduct Forfeiture Act (EOMFA), declares that an official convicted of an offense affecting government functions is subject to forfeiture of any profits made directly or indirectly

At the party, he was introduced as the "Governor of Rock and Roll," and his performance consisted of him singing one five-minute Elvis song, "Treat Me Nice," complete with Elvis-style hip gyrations, flipped up collar, and the top few buttons of his shirt unbuttoned. *Id.*

13. See Mike Robinson, *Blagojevich's Wife to Join Reality Show*, AOL NEWS, May 21, 2009, <http://news.aol.com/article/patti-bлагоjevich-reality-show/438985> (last visited Jan. 18, 2010).

14. See Maureen Ryan, *Trump Fires Blago on 'Celebrity Apprentice'*, CHI. TRIB., Apr. 4, 2010, available at http://featuresblogs.chicagotribune.com/entertainment_tv/2010/04/rod-bлагоjevich-fired-celebrity-apprentice.html. Ryan cited the reasons for Blagojevich's forced departure from the show as "his inability to use technology, his addiction to political doublespeak and his inability to admit mistakes." *Id.*

15. St. Clair, *supra* note 11.

16. *45% Suspect Obama Team Involved in Blagojevich Scandal*, RASMUSSEN REP., Dec. 15, 2008, http://www.rasmussenreports.com/public_content/politics/obama_administration/december_2008/45_suspect_obama_team_involved_in_bлагоjevich_scandal (last visited Aug. 16, 2010).

17. Jack Franks, *Franks to Blago: Don't Spend it All at Once*, HUFFINGTON POST, Sept. 2, 2009, http://www.huffingtonpost.com/jack-franks/franks-to-bлаго-dont-spen_b_275168.html (last visited Aug. 16, 2010).

from his or her crime.¹⁸ Franks has publicly stated that the law is squarely aimed at Blagojevich: “His actions as one of the most mislead [sic] leaders in Illinois history should not be rewarded financially, and he should not profit from sharing his story with the world.”¹⁹

While the EOMFA is new to Illinois, laws aimed at keeping criminals from profiting from their criminal notoriety have been around since the 1970s. These laws are commonly referred to as “Son of Sam” laws after the first law of this kind.²⁰ The original Son of Sam law was passed in New York in 1977 to keep serial killer David Berkowitz, also known as the Son of Sam, from profiting through the publication of his criminal story after his arrest.²¹

The constitutionality of the original Son of Sam law was eventually examined in 1991 by the United States Supreme Court in *Simon & Schuster v. New York State Crime Victims Board*.²² The Court held the law to be an unconstitutional restriction on free speech but suggested that a properly tailored and worded Son of Sam law could conceivably be constitutional.²³

This Comment examines the EOMFA’s constitutionality by applying the standards set forth by the Supreme Court in *Simon & Schuster*. The analysis focuses on the strict scrutiny test that the Supreme Court applied to the original Son of Sam law and how the EOMFA attempts to correct the problems that such a law poses to constitutional freedoms. Additionally, this Comment examines other state laws in which legislatures attempted to correct the failures of New York’s Son of Sam law, how those changes were received in their respective courts, and how the provisions in the EOMFA compare.

II. BACKGROUND

As previously mentioned, the seminal case regarding Son of Sam laws is *Simon & Schuster v. New York State Crime Victims Board*, in

18. The Elected Officials Misconduct Forfeiture Act, H.B. 4078, 96th Gen. Assem., 1st Reg. Sess. (Ill. 2009). Blagojevich’s conviction of making a false statement to a federal investigator may, by itself, put him within the scope of the EOMFA. This crime could be classified as Official Misconduct under Article 33 of the Illinois Criminal Code, which says that a public officer commits misconduct when he “[k]nowingly performs an act which he knows he is forbidden by law to perform.” 720 ILL. COMP. STAT. ANN. 5/33-3(b) (West 1961).

19. Franks, *supra* note 17.

20. See *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 111 (1991); see also *Seres v. Lerner*, 102 P.3d 91, 92 (Nev. 2004); *Keenan v. Super. Ct.*, 40 P.3d 718, 721 (Cal. 2002).

21. See *Simon & Schuster*, 502 U.S. at 108.

22. *Id.*

23. See *id.* at 123.

which the Supreme Court determined the constitutionality of New York's Son of Sam law.²⁴ This law provided that any entity that contracted with a person to buy the rights to his or her criminal story must turn over all proceeds received from the rights to the New York Crime Victims Board.²⁵ In turn, the Crime Victims Board would put the proceeds into an account that would be used to compensate victims of the crime upon their bringing of a civil suit to collect from the account.²⁶ After five years from the date the account was established, if no civil suits were pending, then the account was to be paid back to the person who contracted to tell his or her criminal story.²⁷

While the law was only implemented a few times over several years, the constitutionality of New York's Son of Sam law was finally examined by the Supreme Court in 1991 in *Simon & Schuster*.²⁸ The case revolved around the proceeds from *Wiseguy*,²⁹ a book containing the story of former organized crime member Henry Hill.³⁰

In 1981, Simon & Schuster, Inc., a publishing company, contracted with Hill and author Nicholas Pileggi for the publishing rights of the book which was to contain the story of Hill's life in organized crime.³¹ *Wiseguy* contained detailed accounts of Hill's life in the mob and individual crimes committed by Hill and others with whom he was associated.³² When the New York State Crime Victims Board learned of the contract between Hill and Simon & Schuster, it ordered the publisher to suspend all payments to Hill and provide the Crime Victims Board with copies of any contracts between the parties.³³ Upon reviewing the contracts, the Crime Victims Board found that Simon & Schuster had violated the New York Son of Sam law and ordered the publisher to pay the Board all money it owed Hill so the money could be made available for the victims of Hill's crimes.³⁴ In response, Simon & Schuster filed

24. *Id.*

25. *See id.* at 109.

26. *See id.*

27. *Id.*

28. *See id.* at 105. Some of the people against whom the law was applied include "Jean Harris, the convicted killer of 'Scarsdale Diet' Doctor Herman Tarnower; Mark David Chapman, the man convicted of assassinating John Lennon; and R. Foster Winans, the former Wall Street Journal columnist convicted of insider trading." *Id.* The law was not used against the Son of Sam killer, David Berkowitz, because at that time the law applied only to those who were convicted of a crime and Berkowitz was determined by the court to be incompetent to stand trial. *Id.*

29. NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* (1985).

30. *See Simon & Schuster*, 502 U.S. at 112.

31. *Id.*

32. *Id.* at 113.

33. *Id.* at 114.

34. *Id.* at 114-15 (citing *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)).

suit seeking a declaration that the Son of Sam law was an unconstitutional violation of the First Amendment.³⁵

The case was argued in front of the Supreme Court in October 1991, and an opinion was issued two months later.³⁶ The Court first found that a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."³⁷ The Court then determined that in order to justify such a restriction on speech, the law must satisfy strict scrutiny, which examines: 1) whether the law serves a compelling state interest and 2) whether the law is narrowly tailored to achieve that end.³⁸

The Court found that the Son of Sam law served a compelling interest in "depriving criminals of the profits of their crimes, and in using these funds to compensate victims."³⁹ However, the Court could not determine why the state would have an interest in limiting a victim's compensation "to the proceeds of the wrongdoer's speech about the crime."⁴⁰ Subsequently, the Court looked at whether the law was sufficiently narrowly tailored to achieve compensation from the "fruits of the crime" in general.⁴¹

The Court found that the New York Son of Sam law was significantly overinclusive.⁴² The Court specifically referenced that the law "applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally" and that "the statute's broad definition of 'person convicted of a crime' enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted."⁴³ As a result of this considerable overinclusiveness, the Court held that the Son of Sam law violated the First Amendment.⁴⁴

In concluding its opinion, the Court mentioned that several states and the federal government have different versions of Son of Sam laws, and that the Court was not determining the constitutionality of all such laws, only New York's.⁴⁵ In saying this, the Court implied that a Son of Sam statute which is narrowly tailored to achieving the state's objective

35. *Id.* at 115.

36. *See id.* at 105.

37. *Id.* at 115 (quoting *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

38. *Id.* at 118.

39. *Id.* at 119.

40. *Id.* at 120-21.

41. *See id.*

42. *See id.*

43. *Id.* at 121.

44. *See id.* at 123.

45. *Id.*

could be constitutional.⁴⁶ Illinois is one of the many states that has written or revised its Son of Sam law in an attempt to conform to the *Simon & Schuster* opinion.⁴⁷

The EOMFA was patterned after other Son of Sam laws and has the typical structure of those laws, with a few variations seemingly intended to narrow its scope.⁴⁸ The EOMFA applies only to elected officials who have been removed from office because of a conviction for violation of Article 33 of the Illinois Criminal Code of 1961⁴⁹ or similar federal offenses.⁵⁰ It also applies to elected officials who resign from office voluntarily in anticipation of charges.⁵¹ Upon conviction of such crimes, the Attorney General of Illinois may bring an action against the former elected official on behalf of the people of Illinois.⁵² If the court rules in favor of the Attorney General, any proceeds “traceable to the elected official’s violations of Article 33” are forfeited into either “the General Revenue Fund or the corporate county fund, as appropriate.”⁵³ The period of forfeiture allowed by the EOMFA is limited to the elected official’s term of criminal punishment, which includes imprisonment, probation, and mandatory supervised punishments.⁵⁴ When the elected official’s sentence is fulfilled, he or she can receive the proceeds traceable to his or her criminal act from that point forward.⁵⁵ By applying the guidance from *Simon & Schuster*, this Comment will

46. *See id.*

47. *See* Kathleen Howe, *Is Free Speech Too High a Price to Pay for Crime? Overcoming Constitutional Inconsistencies in Son of Sam Laws*, 24 LOY. L.A. ENT. L. REV. 341, 350 (2004); *see also* Kerry Casey, *The Virginia “Son of Sam” Law: An Unconstitutional Approach to Victim Compensation*, 2 Wm. & Mary Bill Rts. J. 495, 496-97 (1993) (stating that in 1993, two years after the *Simon & Schuster* opinion was handed down, there were 42 states and the federal government which had some version of a Son of Sam law in effect).

48. *Compare, e.g., Simon & Schuster*, 502 U.S. at 109-10 (stating that New York’s Son of Sam law required anyone convicted of a crime who depicted the crime in any way for financial gain, to forfeit profits to the Crime Victims Board so they could be used for the benefit of the victims), *with* The Elected Officials Misconduct Forfeiture Act, H.B. 4078, 96th Gen. Assem., 1st Reg. Sess. (Ill. 2009) (limiting the application of the law to elected officials who break certain laws affecting governmental functions).

49. 720 ILL. COMP. STAT. ANN. 5/33 (West 1961). Article 33 falls under the section of the code dealing with offenses affecting government function and covers crimes of official misconduct in particular. *Id.* The article includes the specific crimes of bribery, failure to report a bribe, official misconduct, solicitation misconduct (state government), solicitation misconduct (local government), gang-related activity by a peace officer or correctional officer, preservation of evidence, bribery to obtain driving privileges, and public contractor misconduct. *Id.*

50. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.*

55. *See id.*

attempt to determine whether the legislature of Illinois took the necessary steps to make its Son of Sam law, the EOMFA, constitutional.

III. ANALYSIS

While many states have amended their Son of Sam laws in response to *Simon & Schuster*, the constitutionality of such a law has not yet been upheld in any top-level appeals court at the state or federal level.⁵⁶ In order to determine whether the EOMFA passes constitutional muster, it must be subjected to the same strict scrutiny test that the Supreme Court applied to New York's Son of Sam law. First, a reviewing court would need to determine whether the EOMFA is necessary to serve a compelling state interest.⁵⁷ Second, it would decide whether the EOMFA is narrowly tailored to serve those state interests.⁵⁸

While the EOMFA has not been challenged as unconstitutional yet, it is probable that it will face such a test at some point in the future. If it does, the Illinois legislature is surely hoping that the modifications that they have made to the traditional Son of Sam law format will be enough for the EOMFA to withstand strict scrutiny. Most of the differences between the Illinois law and the traditional Son of Sam law format have been made in the "narrowly tailored" aspect of the law. The analysis focuses on these changes, but the steps of the strict scrutiny test will be examined in order.

A. *Compelling State Interest*

The first step in a strict scrutiny analysis is determining whether the law serves a compelling state interest.⁵⁹ The EOMFA enumerates Illinois' state interests in Section 10, entitled "Purposes."⁶⁰ The law states that the General Assembly of Illinois has "compelling government interests in: (1) preventing criminals from profiting from their crimes, and (2) ensuring that the victims of crime are compensated by those who harm them."⁶¹ In addition to these enumerated purposes laid out in the Act, a third purpose in the EOMFA explains that "unlawful or deceitful actions of elected officials can erode the public's confidence in its government and debase the public's belief in a fair democratic process."⁶²

56. See Howe, *supra* note 47, at 350.

57. See, e.g., *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

58. See, e.g., *id.*

59. See *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987).

60. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

61. *Id.*

62. *Id.*

The two enumerated purposes of the law seem to have been taken, almost word for word, from the Supreme Court's opinion in *Simon & Schuster* and, therefore, would satisfy the requirement of serving a compelling state interest.⁶³ In *Simon & Schuster*, the Court found that the state "has an undisputed compelling interest in ensuring that criminals do not profit from their crimes."⁶⁴ This parallels the first state interest in the EOMFA.⁶⁵ The second state purpose also follows the language of *Simon & Schuster* in which the Court says that "[t]here can be little doubt . . . that the state has a compelling interest in ensuring that victims of crime are compensated by those who harm them."⁶⁶ Because the purposes of the EOMFA strictly follow the wording and meaning of the Supreme Court's reasoning in *Simon & Schuster*, it is likely that they would be found to be compelling state interests as they were previously by the Court.

The third purpose of the EOMFA seems to be attempting to justify the limitation of the Act to elected officials.⁶⁷ This purpose is not included in the same sentence with the other purposes listed in the EOMFA and is not numbered along with the other purposes.⁶⁸ By removing this objective of the EOMFA from those approved by the Supreme Court, the drafters could be acknowledging that it is merely a supplementary purpose of the Act that is not essential for proving a compelling state interest. Whatever the reason for separating it from the others, it does not detract from the other purposes and even helps to tie the state interests to the limitation of the Act to elected officials. It seems to be simply a minor change included to help differentiate the EOMFA from New York's law discussed in *Simon & Schuster*.

One difference between New York's Son of Sam law and the EOMFA that seems to have greater significance is the wording regarding the application of the laws to a criminal's profits from his or her crime.⁶⁹

63. See *infra* notes 64-65.

64. *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991).

65. Compare *id.* ("The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes."), with The Elected Officials Misconduct Forfeiture Act, H.B. 4078 ("The General Assembly finds that it has compelling government interests in: 1) preventing criminals from profiting from their crimes. . . .").

66. Compare *Simon & Schuster*, 502 U.S. at 118 ("There can be little doubt . . . that the state has a compelling interest in ensuring that victims of crime are compensated by those who harm them."), with The Elected Officials Misconduct Forfeiture Act, H.B. 4078 (stating that Illinois has an interest in "ensuring that the victims of crime are compensated by those who harm them").

67. See The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

68. See *id.*

69. Compare *Simon & Schuster*, 502 U.S. at 108 (stating that a "criminal's income from works describing his crime" are subject to escrow), with The Elected Officials

In the New York law, all of a criminal's speech describing the crime in any way was subject to the law.⁷⁰ The Supreme Court, while searching the law for a compelling interest, found that "the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."⁷¹ While this did not destroy the compelling interest of the New York law, the Court said that the law had to be narrowly tailored to provide compensation from the fruits of the crime in general and not from proceeds of the criminal's speech alone.⁷²

In contrast, the wording of the EOMFA requires forfeiture of "all proceeds traceable to the elected official's violations" of the applicable law.⁷³ It is not entirely clear whether this wording sufficiently alters the meaning of the EOMFA from that of New York's Son of Sam law. At first glance, the wording of the EOMFA seems to provide a drastic change to the meaning of the law. The words "all proceeds traceable to" give the Act the appearance of a criminal forfeiture statute more than that of a Son of Sam law.⁷⁴ However, it is clear from statements made by Jack Franks, the EOMFA's main sponsor in the Illinois House, that the legislature intended the law to operate as a Son of Sam law.⁷⁵ In addition, traditionally forfeiture statutes apply only to property used or acquired during the crime, while Son of Sam laws apply to actions used to gain profit after the commission of the initial crime.⁷⁶ The question that remains is whether "all proceeds traceable to," in the context of a Son of Sam law, makes the Illinois law significantly different from a law such as the New York law, which requires forfeiture of funds based on speech about a crime.

On its face, the "all proceeds traceable to" language in the EOMFA appears to broaden the scope of the traditional Son of Sam law from just speech-based profit to any proceeds which can be traced to a crime.⁷⁷

Misconduct Forfeiture Act, H.B. 4078 (stating that "all proceeds traceable to the elected official's offense" are subject to the statute).

70. See *Simon & Schuster*, 502 U.S. at 108.

71. *Id.* at 120-21.

72. *Id.* at 121.

73. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

74. See Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. L. & SOC. JUST. 45, 50 (2008) (explaining that criminal forfeiture statutes require the forfeiture of property used or obtained by a criminal during a crime with an applicable forfeiture statute).

75. See, e.g., Franks, *supra* note 17 ("[H]e will have to forfeit all profits gained from his participation in any activities based on his notoriety to the state of Illinois. That will include profits from *The Governor*, any paid radio and television appearances, his Web site and more.").

76. See Garretson, *supra* note 74, at 50; Howe, *supra* note 47, at 341.

77. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

This would seem to satisfy the Supreme Court in *Simon & Schuster*.⁷⁸ While the Court agreed that “the State has a compelling interest in compensating victims from the fruits of the crime,” the Court also stressed the fact that “[t]he Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of such ‘storytelling’ *than from any of the criminal’s other assets*.”⁷⁹ It is not entirely clear what the Court meant by this statement. One possible interpretation of “the criminal’s other assets” is that it could refer to anything that the criminal owns. All of the criminal’s property, however, would likely not be fruits of the crime, so this interpretation is likely far too broad. The more conservative interpretation would define “any of the criminal’s other assets” as any assets obtained from the commission of the crime itself. Under this definition, the EOMFA would potentially satisfy the Court’s concern because it requires forfeiture of all proceeds traceable to the crime whether they were derived from speech about the crime or not. As a result, the only question left to determine is whether the EOMFA is narrowly tailored to achieve the state interests.

B. Narrowly Tailored

The next step in the strict scrutiny analysis is more complex and often proves to be the downfall of many Son of Sam laws when facing constitutional scrutiny.⁸⁰ In determining whether New York’s Son of Sam law was narrowly tailored to serve a compelling government interest, the Court found that the law was significantly overinclusive.⁸¹ The EOMFA appears to have attempted to fix this overinclusiveness by limiting the application of the statute to a certain group of people—elected officials—who commit a certain type of offense—offenses affecting governmental functions.⁸²

To determine whether these limitations are sufficient to correct the overinclusiveness of the New York law, the specific reason for the overinclusiveness must be examined. The Court in *Simon & Schuster* specifically mentioned two reasons why the law is too broad: 1) “the statute’s broad definition of ‘person convicted of a crime’ enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted”; and 2) “the statute applies to works on any

78. See *Simon & Schuster*, 502 U.S. at 120-21 (“[T]he State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer’s speech about the crime.”).

79. *Id.* at 119-21 (emphasis added).

80. See, e.g., *Keenan v. Super. Ct.*, 40 P.3d 718, 733-34 (Cal. 2002).

81. See *Simon & Schuster*, 502 U.S. at 121.

82. See The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally."⁸³ The Court said that these two provisions would allow the statute to apply to a huge number of works that do not focus on criminal activity as the central story.⁸⁴ These problems need to have been corrected by the EOMFA's drafters in order for a reviewing court to be able to find the statute constitutional.

1. Broad Definition of Person Convicted of a Crime

The Court was not satisfied with the New York law's definition of a person convicted of a crime.⁸⁵ The law applied both to those convicted as well as to "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."⁸⁶ To remedy this problem, the EOMFA first limits the application of the law to elected officials.⁸⁷ Second, it gives three definitions of who an offending elected official is: an elected official (1) whose "term of office is terminated by operation of law for conviction of an offense, [(2)] who is removed from office on conviction of impeachment for misconduct in office, or [(3)] who resigned from office prior to, upon, or after conviction."⁸⁸ While the three definitions can be interpreted as saying that criminal conviction is required, the second and third definitions leave some question as to whether conviction of impeachment alone is required or whether any criminal conviction will suffice. However, these somewhat obscure definitions are clarified later in the Act. The Act describes the maximum forfeiture for an elected official as the length of any prison time, probation, or any kind of supervised release or parole resulting from a "conviction for violating Article 33 of the Criminal Code of 1961 or similar federal offenses."⁸⁹ This shows that a conviction under Article 33 or another similar offense is required by the Act in order to proceed with forfeiture.

The Court in *Simon & Schuster* only expressed its discontent regarding the lack of a requirement that an author be convicted or even

83. *Simon & Schuster*, 502 U.S. at 121.

84. *See id.* at 121-22 (listing Martin Luther King, Jr., Saint Augustine, Sir Walter Raleigh, Malcolm X, and Henry David Thoreau, among others, as examples of authors with works that could be subject to the Son of Sam law even though only tangential mention is made to criminal activity in their works).

85. *See id.*

86. *Id.* at 110 (quoting N.Y. EXEC. LAW § 632-a(10)(b) (McKinney Supp. 1991)).

87. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

88. *Id.*

89. *Id.*

accused.⁹⁰ Beyond this, the Court did not explain much about what would be sufficient to satisfy the criteria of “a person convicted of a crime.”⁹¹ The Court only mentioned the problem of a lack of accusation or conviction.⁹² This leads one to believe that a person who had been convicted of a criminal offense would satisfy this requirement in the Court’s eyes. The EOMFA is only applicable to elected officials convicted of an Article 33 crime or similar offense of federal law.⁹³ Thus, it would seem that limiting the EOMFA’s application to those convicted of such crimes would be a sufficient definition of a “person convicted of a crime” to cure the overinclusiveness on this issue.

State courts that have examined this issue provide little guidance as to whether similar limitations are sufficient to fix overinclusiveness in this regard. In *Keenan v. Superior Court of Los Angeles County*,⁹⁴ the Supreme Court of California did not think that limiting a Son of Sam law’s application to convicted felons cured the overinclusiveness of the law because it did nothing to “avoid an overbroad infringement of speech.”⁹⁵ The California Supreme Court, however, did not dissect its analysis into the two parts that the United States Supreme Court did in *Simon & Schuster*.⁹⁶ Instead of separately analyzing the broad definition of person convicted of a crime and then analyzing the statute’s application to works on any subject, the California Supreme Court seemed to look at the requirement of conviction of a felony as a proposed cure to the overinclusiveness of both issues together and not just as a cure to one problem with the statute.⁹⁷ Therefore, it is difficult to determine if requiring conviction of a felony in the statute fixes the problem with the broad definition of a person convicted of a crime. The court simply discussed how “[o]ne might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; . . . or provide an inside look at the criminal underworld.”⁹⁸ While the court continues in the opinion to examine the other changes made to the California statute, it provides little guidance

90. See *Simon & Schuster*, 502 U.S. at 121 (explaining that the statute allows for escrow of the income of an author who admits to having committed a crime in his or her work, without regard for whether or not he or she was convicted or even accused).

91. See *id.* at 121-23.

92. See *id.* at 121.

93. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

94. *Keenan v. Super. Ct.*, 40 P.3d 718 (Cal. 2002).

95. See *id.* at 732.

96. Compare *id.* (analyzing the law as a whole), with *Simon & Schuster*, 502 U.S. at 121-22 (separating the analysis of the law into 1) the broadness of the definition of person convicted of a crime and 2) the statute’s application to works on any subject).

97. See *Keenan*, 40 P.3d at 723.

98. *Id.*

regarding what a court might see as an adequate definition of a person convicted of a crime.⁹⁹

Similarly, in *Seres v. Lerner*,¹⁰⁰ the Supreme Court of Nevada focused on the changes to the law as a whole and did not discuss in any detail whether limiting Nevada's law to convicted felons alleviates any of the constitutional concerns caused by the New York law.¹⁰¹ However, the Supreme Court of Rhode Island provides some guidance on the issue, as it found that limiting the Rhode Island Son of Sam statute to persons convicted of felonies was a step in the right direction even though that change alone did not make the statute constitutional.¹⁰²

Together these state opinions provide little insight into whether a criminal conviction is sufficient to satisfy the United States Supreme Court regarding the issue of the New York law's overinclusive definition of "person convicted of a crime." While neither the Supreme Court nor any state court explicitly provides a definition for what a "person convicted of a crime" includes, the EOMFA seems to have passed the Supreme Court's threshold of what this definition is by limiting the Act's application to a certain group of criminals *convicted* of enumerated crimes. At a minimum, the EOMFA seems to address the Court's concern over the lack of requirement of conviction or even accusation in the New York law.¹⁰³

2. Statute's Application to Works on Any Subject

The next issue to examine is whether the law applies to all works that mention criminal activity of any kind no matter how it relates to the main focus of the work. The Court's opinion in *Simon & Schuster* gives little guidance on this point as well.¹⁰⁴ The Court's main concern seems to be the overinclusiveness of requiring forfeiture of proceeds when the crime is only mentioned "tangentially or incidentally" in a work.¹⁰⁵ The Court was worried that the tailoring of New York's Son of Sam law allows it to encompass a huge number of works that do not focus on

99. *See id.* at 733-35.

100. *Seres v. Lerner*, 102 P.3d 91, 97 (Nev. 2004).

101. *See id.*

102. *See Bouchard v. Price*, 694 A.2d 670, 677 (R.I. 1997) ("Although this distinction is not insubstantial insofar as it ensures that the underlying crimes triggering the law in Rhode Island are serious and prosecuted, it fails nevertheless to alleviate the key problem that the Supreme Court identified in the New York law, namely, that even tangential or incidental references to a crime are brought within the ambit of the statute.").

103. *See Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

104. *See id.* at 121-23.

105. *See id.* at 121.

recounting the story of a crime.¹⁰⁶ Only one other statement in the Court's opinion sheds any light on the issue: "the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."¹⁰⁷

The EOMFA also faces this issue. The wording used by the EOMFA, "all proceeds *traceable* to the elected official's offense," is very broad and could potentially cover a wide range of activity by an elected official.¹⁰⁸ New York's law, when examined by the Court in *Simon & Schuster*, included reenactment of a crime in any way as well as "the expression of such accused or convicted person's thoughts, feelings, opinions, or emotions regarding such crime."¹⁰⁹ The EOMFA's use of "traceable" likely allows the Act to encompass activity that New York's law would not have covered.

To clarify this issue, it is helpful to look at the proposed uses of the law against Rod Blagojevich as well as the wording of the statute. Illinois Representative Jack Franks has stated that the EOMFA would require the forfeiture of funds received from Blagojevich's book, paid radio and television appearances, and other financial rewards for "sharing his story with the world."¹¹⁰ However, it is difficult to draw a line between profits that any governor would receive from similar appearances and the profits that Blagojevich is receiving because of the notoriety he has received from his alleged criminal activity. While some of Blagojevich's profits have been directly related to defending himself against the accusations in the media, the law could also take profits from non-crime related work, such as an appearance as an Elvis impersonator, because it could be traced to notoriety received from his crime.¹¹¹ The forfeiture of proceeds for activities such as these gives the EOMFA a very broad scope. For example, with the media attention currently surrounding Blagojevich, there seems to be almost no way for him to earn income that would not be subject to the law. Any other steady job he might obtain at this point could be seen as using his notoriety to make a profit. Even if Blagojevich got a job working in a fast food restaurant, it could be interpreted as a publicity stunt to make the American people find him endearing and to turn a profit from notoriety traceable to his alleged crime.

106. *See id.*

107. *Id.* at 122.

108. The Elected Officials Misconduct Forfeiture Act, H.B. 4078, 96th Gen. Assem., 1st Reg. Sess. (Ill. 2009) (emphasis added).

109. *Simon & Schuster*, 502 U.S. at 121 (quoting N.Y. EXEC. LAW §632-a(1) (McKinney 1982)).

110. *See* Franks, *supra* note 17.

111. *See* Ray Long & Monique Garcia, *Law May Block a Blago Bonanza*, CHI. TRIB., Aug. 19, 2009, at 2.

However, one could argue that applying the statute to proceeds traceable to the crime may actually narrow the scope of the law. Requiring that the activity be traceable to the crime could ensure that only proceeds which came from activities focused on the crime itself were forfeited and not those that merely mentioned the crime in a tangential manner. While the statute can be interpreted this way, the possibility still seems to remain for an interpretation of the EOMFA that would have a very broad application. In fact, the EOMFA's main sponsor in the Illinois General Assembly, Representative Jack Franks, has stated that the EOMFA should be interpreted broadly.¹¹² Franks has argued that if Blagojevich is convicted, the EOMFA would require forfeiture of "all profits gained from his participation in any activities based on his notoriety to the state of Illinois," including his book, any paid appearances on television or radio, and his website.¹¹³ Application of the EOMFA to such activities would consist of forfeiture of profits for materials that in no way describe the alleged crimes committed by Blagojevich or contain an admission of any kind to the crimes in question.¹¹⁴ From Representative Franks' statement, it is clear that the EOMFA allows for a broad interpretation that would likely be seen as overinclusive by the Court.

Therefore, it appears that the EOMFA is a type of "Son of Sam law [that] clearly reaches a wide range of [activity] that does not enable a criminal to profit from his crime while a victim remains uncompensated."¹¹⁵ The EOMFA seems to take the Supreme Court's original concern with such laws, that "the statute applies to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally," and gone even further by applying the law to activities that do not mention the crime in any way.¹¹⁶ The EOMFA simply requires that the elected official receive profits that are traceable to the crime somehow.¹¹⁷ If the Court felt that a law including the tangential mention of a crime was too harsh, then it would probably not look favorably on a law that allowed for forfeiture of proceeds that were acquired because of the criminal's general notoriety. In this respect, the EOMFA seems to have taken a problematic component of New York's Son of Sam law and magnified it. A

112. See Franks, *supra* note 17 (explaining that Franks sees the EOMFA requiring the forfeiture of proceeds from Blagojevich's book even though it does not admit to criminal wrongdoing).

113. *Id.*

114. See Davey, *supra* note 11.

115. Simon & Schuster v. N.Y. State Crime Victims Bd., 502 U.S. 105, 122 (1991).

116. See *id.* at 121.

117. See The Elected Officials Misconduct Forfeiture Act, H.B. 4078, 96th Gen. Assem., 1st Reg. Sess. (Ill. 2009).

reviewing court would likely determine that the Act still applies to a broad range of works on any subject no matter how the work is related to the crime. Accordingly, the same reviewing court would likely find the EOMFA unconstitutional.

Determining what might satisfy the Court regarding this part of the analysis is difficult. One possible solution would be to apply the law only to works that are mainly focused on the criminal act itself, not just traceable to the crime. This would seem to alleviate the Court's concern by prohibiting escrow of works which only tangentially mention a crime.¹¹⁸ It would also seem to prevent the broad interpretation that can be derived from the EOMFA's language of "traceable to the . . . offense" by only applying the statute to works which focus on a crime.¹¹⁹ While on its face this would appear to be enough to satisfy the Supreme Court, it was not sufficient to convince the Supreme Court of California to find a Son of Sam law tailored in this way constitutional:

A statute that confiscates all profits from works which make more than a passing, nondescriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in nonexploitative contexts, and does so by means not narrowly focused on recouping profits from the fruits of crime.¹²⁰

Thus, it appears that, at least according to one state court, limiting a Son of Sam law to works that focus mainly on criminal activity is also not enough to cure its overinclusiveness.

It is unclear if there is any possible way to write a Son of Sam law that is sufficiently narrowly tailored to satisfy strict scrutiny analysis. From *Simon & Schuster*, one cannot tell if the Court believed that it was feasible to keep such a law from being overinclusive. It is more likely that the Court simply did not want to give blanket disapproval to an idea that serves a compelling state interest and could conceivably be written in a way that might make such a statute constitutional. Whatever the Court's reasoning, it is likely that the EOMFA does not have the proper balance that is required to make a Son of Sam law constitutional.

IV. CONCLUSION

While the EOMFA serves a noble public interest in compensating the people of Illinois from profits traceable to elected official misconduct, it faces the same questions regarding constitutionality that

118. *Simon & Schuster*, 502 U.S. at 121.

119. The Elected Officials Misconduct Forfeiture Act, H.B. 4078.

120. *Keenan v. Super. Ct.*, 40 P.3d 718, 733 (Cal. 2002).

other Son of Sam laws have faced. The Supreme Court's opinion in *Simon & Schuster* provides the only definitive guidance available on the issue, and one can only examine this framework given by the Court and try to determine what it might find as an acceptable balance between the First Amendment and Son of Sam laws. The Illinois legislature attempted to achieve this balance by limiting the application of the Act to elected officials who have been convicted of certain crimes. Through application of the Court's analysis in *Simon & Schuster*, one can conclude that this change is likely not enough to make this current incarnation of the Son of Sam law constitutional.

The EOMFA probably serves an acceptable compelling state interest because it closely parallels the compelling interest that the Court in *Simon & Schuster* found to be satisfactory. Where the Act seems to fail to pass the strict scrutiny analysis is in the requirement that it be narrowly tailored to achieve the compelling interest. While the EOMFA seems to take a step forward in narrowing the definition of a person convicted of a crime to only those elected officials who are convicted of the applicable crimes, it seems to lose ground on the statute's broad application to any act traceable to an elected official's crime.

The EOMFA's broad application to all activities which are traceable to an elected official's criminal activity does not seem to remedy a main problem that the Court had with New York's Son of Sam law, namely that it could apply to works which merely mentioned the crime in passing. In *Simon & Schuster*, this problem, in part, led the Court to conclude that the Son of Sam law as a whole was unconstitutional. The EOMFA would likely meet the same fate in a reviewing court because it contains a similar problem. While its purpose is still as compelling as that of the original Son of Sam law, the problems the EOMFA faces regarding unconstitutional First Amendment restrictions seem to remain as well.